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In The

Supreme Court of the United States

OCTOBER TERM, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Illinois Tenure Statutes, Ill.Rev.Stat. 1981, ch. 122, par. 24-11, 24-12 permit multi-year contracts for probationary public school teachers.

2. Whether a probationary public school teacher may ever have a property interest in continued employment protected by the Fourteenth Amendment to the Constitution of the United States when there exists a state statutory system.

3. Whether the breach of a probationary public school teacher's employment contract is litigable in federal court under 42 U.S.C. §1983.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1) is reported at 706 F.2d 1435 (1983). The opinion of the District Court (Pet. App. 43) is not reported.

JURISDICTION

The respondent brought his action for declaratory and injunctive relief and damages under the provisions of 42 U.S.C. §1983, claiming that the petitioners, acting under color of state law, terminated the respondent's contract of employment without cause, without notice and without hearing in violation of respondent's right to due process of law under the Fourteenth Amendment. (Pet. App. 43) The District Court found jurisdiction vested under the provisions of 28 U.S.C. §1343(3). (Pet. App. 43) Over petitioners' Motion to Dismiss for Lack of Jurisdiction, the District Court conducted a bench trial and entered its Findings of Fact, Conclusions of Law, Memorandum Opinion and Final Order on June 13, 1982. (Pet. App. 43-49)

Timely appeal was perfected to the United States Court of Appeals for the Seventh Circuit by the petitioners. (Pet. p. 2) On April 19, 1983, a split Court of Appeals affirmed the District Court by a two-to-one decision. (Pet. App. 1-42)

The Petition for a Writ of Certiorari was filed on July 15, 1983, and was granted on October 3, 1983. (J.A. p. 38) Jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals by Petition for Writ of Certiorari is conferred by 28 U.S.C. §1254(1). (Pet. p. 2)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983 and the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122, par. 24-11 and 24-12, are set forth in the Petition

for Writ of Certiorari at App. 55-61.

STATEMENT

The petitioners are the Board of Education of Paris Union School District No. 95 (Board), Paris, Illinois, and three individual members thereof. (Pet. p. 2) The respondent (Vail) is a public school teacher certified under the laws of the State of Illinois; and at the time this action was commenced, he had over twenty years of teaching and coaching experience at the high school or college level. (Pet. App. 44)

Illinois has a statutory tenure system found in Sections 24-11 and 24-12 of the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122. Under this statutory scheme, a public school teacher can acquire tenure only after two years of full-time, consecutive, year-to-year employment. Ill. Rev. Stat. 1981, ch. 122, par. 24-11. Having acquired tenure, a teacher is entitled to continued employment absent dismissal for cause.

Procedural protection afforded an Illinois public school teacher before he is discharged corresponds to his job security. As a matter of statutory law, a tenured teacher cannot be discharged except for cause upon specific charges and pursuant to certain procedures. Ill. Rev. Stat. 1981, ch. 122, par. 24-12.

In contrast to the aforequoted protections afforded to the tenured teacher, the School Code provides relatively little protection for a nontenured teacher who simply is not reemployed for the next year. A nontenured teacher completing the first year of probationary service, only need be informed at least sixty days before the end of the school term of his nonretention, and a teacher completing the second year of probationary service is additionally entitled to know the reasons

for the nonrenewal. Ill. Rev. Stat. 1981, ch. 122, par. 24-11.

On June 15, 1980, a search committee, representatives of the Board, Board members Wallace and Davis, Superintendent Dr. James Cherry, and High School Principal Marchiando traveled to Joliet, Illinois, to interview the respondent for a job as athletic director, district physical education coordinator and football coach. (Pet. App. 44) Respondent was at that time employed as supervisor of recreation and physical education for the Stateville Correctional Center in Joliet. (Pet. App. 44)

In addition to talking about the nature of the duties Vail would be expected to perform, discussion between the search committee and Vail was also had concerning the length of the term of Vail's proposed contract. (Pet. App. 44) Vail expressed concern about the term of the proposed contract and commented that its length would be a factor in his deciding whether to accept the position if it was offered. (Pet. App. 44) The search committee told Vail that the length of the term of the contract would be a matter decided by the full Board and that the committee could make no commitment beyond the one-year statutory term of a first-year probationary teacher. (Pet. App. 44-45)

On June 24, 1980, the petitioner Board met in special session to consider hiring respondent. (Pet. App. 45) The Board unanimously agreed to offer Vail a contract of employment as athletic director and head football coach. (Pet. App. 45) After discussing the length of the term of the contract, it was the concensus of the Board that it would assure Vail that his one-year written contract would be renewed at the end of the first year. (Pet. App. 45) Superintendent Cherry was directed to make that kind of an offer to Vail, which he did by telephone that same evening. (Pet. App. 45)

Subsequently Vail traveled to Paris to execute the written contract, and in due course entered into the performance of his duties. (Pet. App. 45)

On March 2, 1981, during respondent's first year of employment, the Board met in public session; and pursuant to, and in full compliance with the statutory provisions outlined in Section 24-11 of the Illinois School Code, voted three to two not to renew respondent's contract for the following year. (Pet. App. 45) No hearing or reasons for the nonrenewal were given to respondent. (Pet. App. 45)

The respondent brought this action in Federal District Court, alleging, among other things, that the decision not to renew his contract without stated cause or hearing violated his Constitutional right to due process. (Pet. App. 45) The District Court found "... that the Board made a commitment to the plaintiff to extend his contract for a second year . . . " (Pet. App. 46) and that such commitment constituted a "property interest" of which Vail was deprived by the Board's failure to provide notice, reasons and a hearing in violation of 42 U.S.C. §1983. (Pet. App. 48) The District Court denied Vail reinstatement by concluding that he had "[A]n adequate remedy at law in money damages for the breach of contract and denial of property right that [was] worked upon him." (Pet. App. 49) Stipulated economic damages in the amount of $19,850.99 were awarded Vail. (Pet. App. 48)

On April 19, 1983, the Court of Appeals for the Seventh Circuit, with one Judge dissenting, affirmed the District Court's decision. (Pet. App. 1-42) The United States Supreme Court granted the Petition for Writ of Certiorari on October 3, 1983. (J.A. p. 38)

SUMMARY OF ARGUMENT

In 1972, this Court decided the companion cases of *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Since those decisions, the Court has considered other "property interest" questions, but has not decided any case specifically involving a probationary public school teacher's claim to Fourteenth Amendment property interest protection within the backdrop of a statutorily imposed job tenure system. See *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Jago v. Van Curen*, 454 U.S. 14, 18-19, 102 S.Ct. 31, 70, L.Ed.2d 13 (1981) *(per curiam)*; *Leis v. Flynt*, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*; and *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

In *Roth*, the Court held government benefits are "property" within the meaning of the Fourteenth Amendment, only when the recipient has a legitimate expectation, grounded in state law, to continue receiving such benefits. Because Professor Roth, a probationary employee under Wisconsin tenure statutes, could not point to any law or understanding that would support a "legitimate" expectation of a renewal of his one-year contract, the university's decision not to rehire him did not deprive him of a property interest sufficient to merit applying due process.

In *Sindermann*, the Court held a procedural due process right would exist if it could be shown that there existed a *de facto* tenure program fostered by the governmental employer. The Court remanded the case in order that Professor Sindermann be given the opportunity to prove there existed "mutually explicit under-

standings" between him and the university to support his *de facto* tenure claim. The Court, through Justice Stewart, commented upon the significance that a formal tenure system would have had on Sindermann's property interest claim if one had existed in Texas:

> If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job *tenure* the respondent's claim would be defeated. 408 U.S. at 602, n.7. (emphasis added).

The majority opinion of the Court of Appeals in the instant case relied primarily on its reading of *Sindermann*, while Judge Eschbach, in his concurring opinion, addressed the application of *Roth* at length. The Court of Appeals concluded that since respondent Vail had proven the existence of an implied contract right to a second year of probationary employment under Illinois contract law, he had established a protectible property interest under the Fourteenth Amendment of which he could not be deprived without due process in spite of the Illinois tenure scheme.

I. Illinois has a statutory tenure system found in Sections 24-11 and 24-12 of the Illinois School Code, Ill. Rev. Stat. 1981, ch. 122, par. 24-11 and 24-12. Under this system, new teachers are subject to a two-year probationary period consisting of two separate one-year contracts before they may attain tenure. A school district may choose not to rehire a first-year teacher merely by giving notice of nonrenewal within the statutory period. A second-year teacher must be given timely notice and the specific reasons for nonrenewal. On the other hand, a tenured teacher can be dismissed only for cause and after due process proceedings.

The result reached by the Court of Appeals rests soundly upon the conclusion that in Illinois, a probationary teacher may be hired to a multi-year contract. Had the Court of

Appeals concluded otherwise, the case could have been disposed of without reaching the Constitutional due process issue. The petitioners assert that the Court of Appeal's construction of the Illinois tenure statutes was erroneous based on state law precedent and rules of construction established by the Illinois Supreme Court. *Johnson v. Board of Education of Decatur School District No. 61*, 85 Ill.2d 338, 423 N.E.2d 903 (1981), *Wesclin Education Association v. Board of Education of Wesclin Community Unit School District No. 3 of Clinton and St. Clair Counties*, 30 Ill.App.3d 67, 331 N.E.2d 335 (5th Dist., 1975), and *Bessler v. Board of Education*, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976).

If the Court were to agree that the Illinois School Code prohibits a two-year probationary contract, the Constitutional due process question would not be reached, for it is clear that the Illinois legislature has created a statutory scheme whereby a tenured employee has a property interest in continued employment, while a probationary teacher whose contract is not renewed does not. *Miller v. School District No. 167*, 354 F.Supp. 922 aff'd on other grounds, 495 F.2d 658 (7th Cir., 1974) and *Vance v. Board of Education*, 2 Ill.App.3d 745, 277 N.E.2d 337 (1971).

II. Even if the Court is convinced that the Court of Appeals' analysis of Illinois statutory law is correct and that a two-year probationary contract is permitted under Illinois law, there still is no federal interest in this case under 42 U.S.C. §1983.

Petitioners contend that *Roth* and *Sindermann* can be read for the proposition that under a state statutory tenure system a probationary employee can have no legitimate expectation of continued employment since the state has seen fit to restrict such a right to tenured employees. At least one Federal Circuit Court of Appeals has read *Sindermann* to say as much. *Ryan v. Aurora City Board of Educa-*

tion, 540 F.2d 222 (1976). The Ryan court held "that a non-tenured teacher has no 'expectancy' of continued employment, *whatever may be the policies* of the institution, where there exists a statutory tenure system", *Ryan* at 227, (emphasis added), and that "this conclusion is supported by the Supreme Court's decision in *Sindermann*". *Ryan* at 227. Such a reading is also plausible in light of the Court's subsequent decisions in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*, which further delimited the boundaries of due process protections.

Although the facts in the case at bar differ from those of the other property interest cases decided by the Court because of the District Court's express finding that "... the plaintiff had a commitment for two years of employment by the defendant school board". (Pet. App. 48). The distinction is insignificant. It is insignificant because Illinois has a statutory tenure scheme which establishes and defines the parameters of respondent Vail's legitimate expectations of continued employment with the petitioner Board, much the same as Wisconsin's tenure provisions defined Professor Roth's employment expectations, the City of Marion's ordinance defined Policeman Bishop's employment expectations, and the Ohio Supreme Court's rules controlled *pro hac vice* representation by out-of-state attorneys. Patently, no board of education, no matter how unwittingly, has the authority or power to enlarge the limits of teacher tenure beyond statutory limits. Nor can this be accomplished by estoppel, 439 U.S. at 444, n.5., for to do so is to amend the Illinois tenure statutes by judicial decree.

Even in the absence of a property right protected by the Constitution, respondent Vail is not prevented from seeking redress in the Illinois courts for breach of his employment contract. *Zannis v. Lake Shore Radiologists, Ltd.*, 73

Ill.App.3d 901, 392 N.E.2d 126 (1979) and *Bessler v. Board of Education*, 43 Ill.App.3d 322, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1976). Appropriate damages would be awarded if respondent Vail were to prove, under state law, that he had an enforceable two-year employment contract which had been breached--a determination more appropriately left to the Illinois courts.

III. Assuming arguendo that respondent Vail's implied two-year probationary employment contract is a property interest under the Constitution, Vail suffered no deprivation of that interest given the availability of an adequate state common law remedy for breach of contract. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Judge Posner, in his dissent, *Vail v. Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart*, 706 F.2d 1435-1456 (7th Cir., 1983), gives exhaustive treatment to this issue; and to avoid repetition, the petitioners adopt his arguments and rationale in support of their reliance on *Parratt*.

ARGUMENT

Almost twelve years ago in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), this Court examined the right of nontenured teachers in public institutions to procedural due process prior to the nonrenewal of their contracts. Both cases were decided on the same day and both involved professors of political science at public institutions of higher learning whose one-year employment contracts had not been renewed. Each professor claimed that the institution's failure to provide a hearing violated due process rights afforded him by the Fourteenth Amendment and the Civil

Rights Act. This Court granted relief to Professor Sindermann, but not to Professor Roth.

In Roth, the Court held government benefits are "property" within the meaning of the Fourteenth Amendment, only when the recipient has a legitimate expectation, grounded in state law, to continue receiving such benefits. Justice Stewart, writing for the Court in *Roth*, recognized property interests protected by procedural due process "extend well beyond actual ownership of [material things.]" (408 U.S. at 571-72):

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. 408 U.S. at 577.

Justice Stewart delimited the parameters of the term:

> Certain attributes of "property" interests protected by procedural due process emerge from [prior] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. 408 U.S. at 577.

That "legitimacy" must in turn be found in additional objective sources:

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[1] United States Constitution, Fourteenth Amendment, Section 1 (Pet. App. 55); United States Code, Chapter 42, Section 1983 (Pet. App. 55 & 56)

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. 408 U.S. at 577.

The Court then focused on applying this definition to the nature of the interest asserted by Professor Roth. To establish a legitimate entitlement that would invoke the due process clause, Professor Roth first had to identify a property interest which would trigger due process protection. Because Professor Roth could not point to any law or understanding that would support a "legitimate" expectation of a renewal of his contract, the university's decision not to rehire him did not deprive him of a property interest sufficient to merit applying due process. 408 U.S. at 578. Of significance was that the State of Wisconsin had a statutory tenure system under which Professor Roth was a probationary employee.[2]

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[2] Wis.Stat. §37.31(1) (1967), in force at the time, provided in pertinent part that

> All teachers in any state university shall initially be employed on probation. The employment shall be permanent during efficiency and good behavior after 4 years of continous service in the state university system as a teacher." *Roth* at 566, n.2.

Wis.Stat. §37.31(1) further provided that

> No teacher who has become permanently employed as herein provided shall be discharged except for cause upon written charges. Within 30 days of receiving the written charges, such teacher may appeal the discharge by a written notice to the president of the board of regents of state colleges. The board shall cause the charges to be investigated, hear the case and provide such teacher with a written statement as to their decision." *Roth* at 567, n.3.

In *Sindermann*, the Court held a procedural due process right would exist if it could be shown that there existed a *de facto* tenure program supported by" rules or mutually explicit understandings" fostered by the governmental employer. 408 U.S. at 601. Although primarily addressing the issue of *de facto* tenure, Justice Stewart, again writing for the Court, seized the opportunity to comment upon the significance that a formal tenure system would have had on Professor *Sindermann's* property interest claim if one had existed in Texas:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service--and from other relevant facts--that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 579, 80 S.Ct. 1347, 1351, 4 L.Ed.2d 1409, so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university, like Odessa Junior College, that has no *explicit tenure system* even for senior members of its faculty, but that nonetheless may have created such a system in practice. See C. Byse & L. Joughin, Tenure in American Higher Education 17-28 (1959). 408 U.S.at 602. (emphasis added)

In footnote 7, Justice Stewart concludes:

> We do not now hold that the respondent has any such legitimate claim of entitlement to

> job tenure. For "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, *supra*, 408 U.S., at 577, 92 S.Ct. at 2709. *If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.* 408 U.S. at 602. (emphasis added).

The majority opinion of the Court of Appeals in the case at bar appears to rely primarily on *Sindermann*, while Judge Eschbach, in his concurring opinion, addresses the application of *Roth* at length. Judge Eschbach opines that if a probationary school teacher can prove the existence of an implied contract right to continued employment under state law, he has satisfied the requirements of *Roth* to establish a protectible property interest under the Fourteenth Amendment. *Vail v. Board of Education of Paris Union School District No. 95, Terrance C. Parks, Charles R. Fox and Bernie Rinehart*, 706 F.2d 1435, 1443 (7th Cir., 1983) [3] Likewise, the majority opinion reasons that once the existence of an implied contract is established by a probationary teacher, a protectible property interest is created in spite of a statutory tenure scheme. *Vail* at 1438.

In addition to the issue of statutory construction advanced in Point I of this Brief, the other issues to be decided

[3] *Contra, Green v. Board of School Commissioners of the City of Indianapolis*, 716 F.2d 1191 (7th Cir., 1983), wherein the Court of Appeals for the Seventh Circuit, in a case decided less than four months after the Court's decision in *Vail*, suggested that the only property right a school bus driver has because of his one-year employment contract is the right to sue in state court for breach of contract.

are 1) whether a probationary public school teacher may ever have a property interest in continued employment protected by the Fourteenth Amendment when there exists a statutory tenure system; and 2) whether the breach of a probationary public school teacher's employment contract is litigable in federal court under 42 U.S.C. §1983. We shall show that under the authority of *Roth*, *Sindermann* and subsequent property interest cases decided by the Court, the answer to both of these questions is "no".

I. THE PROPER CONSTRUCTION OF THE ILLINOIS TENURE STATUTES WILL RESULT IN REVERSAL OF THE COURT OF APPEALS' DECISION WITHOUT REACHING ANY CONSTITUTIONAL ISSUE.

Unlike *Sindermann*, the instant case presents a claim by a public educational employee that flies in the face of an established state tenure system. Illinois' statutory tenure system is found in Sections 24-11 and 24-12 of the Illinois School Code, Ill.Rev.Stat. 1981, ch. 122, par. 24-11, 24-12. The Illinois legislative plan as to tenure and public school teachers is plain. New teachers in a school district are subject to a two-year probationary period consisting of two separate one-year contracts before they attain tenure.

Section 24-11 of the Illinois School Code provides, *inter alia*:

> Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period. For the purpose of determining contractual continued service, the first probationary year shall be any full time employment from a date

> before November 1 through the end of the school year. . . .
>
> Any full-time teacher who is completing the first year of the probationary period described in the preceding paragraph, or any teacher employed on a full-time basis not later than January 1 of the school term, shall receive written notice from the employing board at least 60 days before the end of any school term whether or not he will be reemployed for the following school term. *If the board fails to give such notice, the employee shall be deemed reemployed, and not later than the close of the then current school term the board shall issue a regular contract to the employee as though the board had reemployed him in the usual manner.* Ill.Rev.Stat. 1981, ch. 122, par. 24-11. (emphasis added).

As can be seen above, a school district may choose not to rehire a first-year teacher merely by giving notice of nonrenewal within the statutory period. If such notice is not given, the school district is then obligated to issue to the teacher a regular contract for the second probationary year. A second-year teacher must be given timely notice of nonrenewal and a list of the reasons therefor; otherwise the teacher automatically advances to tenure. Ill.Rev.Stat. 1981, ch. 122, par. 24-11. Once tenure attaches, the teacher cannot be discharged, except for cause upon specific charges, pursuant to certain due process procedures; and if the cause is remediable, the teacher must be given a reasonable opportunity to correct the deficiency prior to discharge. (See Ill. Rev. Stat. 1981, ch. 122, par. 24-11 and 24-12; Petition for Writ of Certiorari, App. 56).

The result reached by the Court of Appeals below rests soundly upon the conclusion that in the State of Illinois, a

probationary teacher may be hired to a multi-year contract. *Vail* at 1439. The Court of Appeals was unable to point to any statutory provision empowering Illinois school boards to hire probationary teachers to multi-year contracts, but reasoned that because the provisions which empower boards to hire teachers do not limit the length of teacher contracts, multi-year contracts are sanctioned by state law. *Vail* at 1439. This premise is a clear misreading of the plain language of the state statutes and ignores the firmly established principle of Illinois law that a school board has only those powers expressly authorized by the state legislature through statute.[4] *Bio-Medical Laboratories, Inc. v. Trainor,*

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[4] Had the legislature meant boards to have the power to offer teachers multi-year contracts, it would have specifically so provided as it did in Sections 10-23.8 and 10-23.8a of the Illinois School Code. Section 10-23.8 states, *inter alia*:

> *§10-23.8 Superintendent under multi-year contract. To employ a superintendent under a multi-year contract. No such contract can be offered or accepted for less than or more than three years, except for a person serving as superintendent for the first time in Illinois. In such case, the initial contract shall be for a two year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.*

Section 10-23.8a states, inter alia:

> §10-23.8a Principal under multi-year contract. To employ a principal under a multi-year contract. No such contract can be offered or accepted for less than or more than 3 years, except for a person serving as principal for the first time in Illinois. In such case, the initial contract shall be for a 2 year period. Such contract may be discontinued at any time by mutual agreement of the contracting parties, or may be extended for an additional 3 years at the end of any year.

68 Ill.2d 540, 551, 370 N.E.2d 223 (1977); *Northern Illinois Automobile Wreckers and Rebuilders Association v. Dixon*, 75 Ill.2d 53, 60, 387 N.E.2d 320 (1979), cert. den. 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979); *City of Chicago v. Fair Employment Practices Commission*, 65 Ill.2d 108, 112-113, 357 N.E.2d 1154 (1976). It also flies in the face of the stated purpose of the Illinois tenure provisions and rules of construction to be placed on those provisions by Illinois courts:

> The tenure system is, we believe, intended to provide continuity and stability for students; provide some degree of job security, thus affording teachers the ability to pursue a career free from arbitrary hiring and firing; attract teachers of high quality; and retain experienced teachers. *Since, however, the statutes create liabilities where none would otherwise exist, they must be strictly construed in order not to unduly interfere with the responsibility of local boards to efficiently operate the educational systems.* *Johnson v. Board of Education of Decatur School District No. 61*, 85 Ill.2d 338, 423 N.E.2d 903 (1981). (emphasis added)

Though the Illinois Supreme Court has yet to rule on the legality of a two-year probationary contract within the framework of the Illinois statutory tenure scheme, petitioners submit that were the Court given the opportunity, it would adopt the reasoning of the Illinois Appellate Court as expressed in *Wesclin Education Association v. Board of Education of Wesclin Community Unit School District No. 3 of Clinton and St. Clair Counties*, 30 Ill.App.3d 67, 331 N.E.2d 335 (5th Dist., 1975). *Wesclin* dealt with the issue of whether an Illinois "school board can impose upon itself conditions precedent to the dismissal of a nontenured teacher, which are in excess of the conditions imposed by the School Code". *Wesclin* at 75. In *Wesclin*, the Court

stated:

> In order to analyze this issue we must examine the nature and origin of a school board's power. A school board is the creation of the General Assembly. (Ill. Rev. Stat. 1971, ch. 122, par. 10--1 *et seq.*) It is a body politic and corporate created to perform governmental functions in connection with the education of children in its respective school district and it has such powers as are expressly conferred or such as may be necessary to carry into effect those granted by the General Assembly. *(Board of Education v. Chicago Teachers Union*, 26 Ill.App.3d 806, 326 N.E.2d 158; *Rosenheim v. City of Chicago*, 12 Ill.App.2d 382, 139 N.E.2d 856.) Statutes conferring powers on a school board must be strictly construed and should be construed not only as a grant of power but also as a limitation thereof. *Bohn v. Stubblefield*, 238 Ill.App. 453.
>
> Section 10--22.4 of the School Code vests a board of education with the authority to dismiss teachers. Such authority is limited only by sections 24--11 to 24--15, inclusive. Under section 24--11 of the School Code, a "probationary" (nontenured) teacher is only entitled to receive "written notice from the employing board at least 60 days before the end of any school term whether or not he will be re-employed for the following school term" (Ill. Rev. Stat. 1971, ch. 122, par. 24--11); whereas under section 24--12, a teacher in continued contractual service status is entitled to procedural protection such as a hearing, specific charges and proper cause.

warnings in remedial cases and preference in rehiring where dismissal is due to the decrease in the number of teachers. As stated by the court in *Rockford Education Association v. Board of Education*, 11 Ill.App.3d 78, 80, 296 N.E.2d 100, 102:

> "The Teacher Tenure Law appears to be designed primarily for the protection of tenured teachers, evidencing an intent to give first year probationary teachers the least amount of protection and the board the maximum amount of flexibility in dealing with such teachers so long as the notice requirement is fulfilled. *People ex rel. Ruff v. School Directors* (1948), 335 Ill.App. 445, 448, 82. See also *Hankenson v. Board of Education* (1957), 10 Ill.2d 560, 563."

We believe that just as a school board cannot abrogate the procedural safeguards accorded tenured teachers, neither can it, by means of a collective bargaining agreement, destroy the flexibility accorded it with respect to the dismissal of nontenured teachers. See *Board of Education v. Rockford Education Association*, 3 Ill.App.3d 1090, 280 N.E.2d 286; *Elder v. Board of Education of School District No. 127½*, 60 Ill.App.2d 56, 208 N.E.2d 423; *Stroh v. Casner*, 201 Ill.App. 281. *Wesclin* at 75 and 76.

In accord with *Wesclin* is *Bessler v. Board of Education*, 43 Ill.App.3d 322, 370, 356 N.E.2d 1253 (3rd Dist., 1976), modified 69 Ill.2d 191, 370 N.E.2d 1050 (1977), in which the Third District Illinois Appellate Court held that the

probationary period under Illinois law is a mandatory term prescribed by statute, which cannot be altered by a board of education.

Applying the rationale of *Wesclin*, along with the Illinois Supreme Court's rules of statutory construction, petitioners contend that the Illinois Supreme Court would conclude that Section 24-11 of the Illinois School Code prohibits a two-year probationary contract and that, consequently, respondent Vail had nothing more than what the statute provides--a one-year contract which was not renewed by the petitioner Board. Under such a ruling, the Constitutional due process question would not be reached for it is clear that the Illinois legislature has created a statutory scheme for its public school teachers whereby a tenured employee has a property interest in continued employment, while a probationary teacher whose contract is not renewed does not. *Miller v. School District No. 167*, 354 F.Supp. 922, aff'd on other grounds, 495 F.2d 658 (7th Cir., 1974), petition for rehearing denied, 500 F.2d 711 (7th Cir., 1974); see also *Vance v. Board of Education*, 2 Ill.App.3d 745, 277 N.E.2d 337 (1971). *Shirck v. Thomas*, 486 F.2d 691 (7th Cir., 1973). (statutory requirement that a final-year probationary teacher be given reasons for dismissal does not create a "property interest"); *Board of Trustees v. Cook County College Teachers Union, Local 1600*, 62 Ill.2d 470, 343 N.E.2d 473 (1976). (an evaluation clause in a collective bargaining agreement does not create a "property interest" in a nontenured teacher sufficient to require a due process hearing).

II. A PROBATIONARY PUBLIC SCHOOL TEACHER HAS NO PROPERTY INTEREST IN CONTINUED EMPLOYMENT PROTECTED BY THE FOURTEENTH AMENDMENT WHEN THERE EXISTS A STATUTORY TENURE SYSTEM.

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[5]There is no contention that the Board failed to act in compliance with the nonrenewal procedures of Section 24-11.

If the Court is convinced that the Court of Appeals' analysis of Illinois statutory law is correct and that a two-year probationary contract is not prohibited under Illinois law, there still is no federal interest in this case under 42 U.S.C. §1983.

This Court has yet to equate a probationary employee's contract right to employment with a property right secured by the Constitution. While petitioners endorse Judge Posner's dissenting argument on the property interest question, *Vail* at 1449-1452, they advance yet another rationale for the proposition that a probationary teacher's implied contract right to continued employment can never rise to the level of a property interest protected by the Fourteenth Amendment when viewed within the framework of a statutory tenure system. That rationale stems from the reasoning expressed by the Court in *Roth* and *Sindermann*.

Roth and *Sindermann* can be read for the proposition that under a statutory tenure system a probationary employee, or otherwise nontenured teacher, can have no legitimate expectation of continued employment since the state has seen fit to restrict such a right to tenured employees. At least one Federal Circuit Court of Appeals has read *Sindermann* to say as much. In *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (1976), the plaintiffs, like respondent Vail, were nontenured teachers under a statutory tenure system, which conferred tenure rights upon such teachers only after a period of probationary employment. The plaintiff in *Ryan* argued that certain regulations adopted by the board of education contained a clearly "implied promise" under *Roth* to continued employment, thereby creating a property interest protectible by the Constitution. Like the plaintiffs in *Ryan*, respondent Vail bases his entitlement to Fourteenth Amendment protection on an implied agreement with the defendant board of education. The basis of the "implied promise" in *Ryan* is the only distinguishing fact

from the case at hand. This distinction is hollow in light of the fact that both "implied promises" were the creation of the employing boards of education. In other words, the implied promise occasioned by a concensus opinion of the board in *Vail* is no different than the implied promise created by rule or regulation in *Ryan*.

The *Ryan* court concluded "[t]hat a non-tenured teacher has no 'expectancy' of continued employment, *whatever may be the policies* of the institution, where there exists a statutory tenure system", *Ryan* at 227, (emphasis added), and that "[t]his conclusion is supported by the Supreme Court's decision in *Sindermann*". *Ryan* at 227. Such a reading is also plausible in light of the Court's subsequent decisions in *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698, 58 L.Ed.2d 717, reh. den. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979) *(per curiam)*, which further delimited the boundaries of due process protections.

In *Bishop v. Wood*, the City of Marion, North Carolina, discharged a city police officer without a hearing, despite his classification as a permanent employee. 426 U.S. at 343. The city, however, did comply with the minimal procedures prescribed by ordinance. 426 U.S. at 347. Bishop argued that his classification as a permanent employee under the ordinance created a protected property interest in his job. 426 U.S. at 344. Justice Stevens, expressing the view of five members of the Court, stated the issue squarely as "[w]hether petitioner's employment status was a property interest protected by the Due Process Clause of the Fourteenth Amendment, . . . " (footnote omitted) 426 U.S. at 343. The Court, through Justice Stevens, concluded it was not. Relying on a federal district court's interpretation of the city ordinance, Justice Stevens construed the ordinance "as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." (footnote omitted) 426 U.S. at 345. The Court justified its deference to state law

in determining when employment constituted "property" by noting that "[t]he federal court is not the appropriate forum in which to review a multitude of personnel decisions that are made daily by public agencies." (footnote omitted) 426 U.S. at 349. Thus, because the city, as a matter of law, could discharge Bishop at will as long as it followed certain minimal procedures, his status failed to generate the legitimate expectation that would support a property interest when that expectation was founded upon a mistaken understanding of state law, regardless of how reasonable that understanding was.[6]

Leis v. Flynt involved the summary denial of permission by Ohio courts for two out-of-state attorneys to appear *pro hac vice* on their clients' behalf. The attorneys claimed that the denial deprived them without due process of their property interests in the ability to practice law. 439 U.S. at 438. Adopting the reasoning expressed in *Bishop*, the Court stated that it need not address the due process question until the property interest question was answered. 439 U.S. at 441. In order for the attorneys to establish a property interest, they had to do so by means of some objective legal source. 439 U.S. at 441.

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[6] A number of federal circuit courts have held that an employee does not have a right or property in his job when his expectation of continued employment is at odds with federal or state law or with published tenure rules. *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981); *Quinn v. Syracuse Model Neighborhood Corporation*, 613 F.2d 438 (2d Cir. 1980); *Eichman v. Indiana State University Board of Trustees*, 597 F.2d 1104 (7th Cir. 1979); *Davis v. Oregon State University*, 591 F.2d 493 (9th Cir. 1978); *Mack v. Cape Elizabeth School Board*, 553 F.2d 720 (1st Cir. 1977); *Ryan v. Aurora City Board of Education*, 540 F.2d 222 (6th Cir. 1976); *Lukac v. Acocks*, 466 F.2d 577 (6th Cir. 1972). Accord *Penman v. Board of Trustees*, 94 Ill.App.3d 139, 145-146 (5th Dist. 1981) (Pet.App. 8, n.5).

In concluding that the interest alleged in *Flynt* was not a legitimate property interest, the Court rejected the notion that there should be an examination of the factual possibility that an understanding sufficient to create a legitimate expectation may have developed from the Ohio courts' practice of permitting *pro hac vice* representation. 439 U.S. at 442-43. The Court found it unnecessary to reach this factual question because "the rules of the Ohio Supreme Court expressly consign the authority to approve a *pro hac vice* appearance to the discretion of the trial court." 439 U.S. at 443. In replying to Justice Stevens' dissenting suggestion that a *de facto* change in the stated rules may have occurred based on practices of Ohio trial courts, 439 U.S. at 453-56, the Court stated:

> The second ground for due process protection identified in the dissenting opinion is the "implicit promise" inherent in Ohio's past practice in "assur[ing] out-of-state practitioners that they are welcome in Ohio's courts. . . . " Post, at 456, 453, 58 L.Ed.2d, at 730, 728. We recall no other claim that a constitutional right can be created--as if by estoppel--merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past. 439 U.S. at 444, n.5. (emphasis in original).

Thus, the Court deferred, as it similiarly had done in *Bishop*, to rules which had been promulgated by the regulating authority, to-wit, the Ohio Supreme Court, in determining whether an interest is property within the meaning of the Constitution. The Court's reliance in *Flynt* on the role of the Ohio Supreme Court rules in assessing the property interest issue seems consistent with Justice Stewart's statement in *Sindermann* that "[i]f it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job *tenure* the respondent's claim would be defeated". 408 U.S. at 602, n.7. (emphasis added).

Admittedly, the facts in the case at bar differ from those of the other property interest cases discussed above because of the District Court's express finding that "... the plaintiff had a commitment for two years of employment by the defendant school board". (Pet. App. 48) This distinction, however, is insignificant in light of the fact that Illinois has a statutory tenure scheme which establishes and defines the parameters of respondent Vail's legitimate expectations of continued employment with the petitioner Board, much the same as Wisconsin's tenure provisions defined Professor Roth's employment expectations, the City of Marion's ordinance defined Policeman Bishop's employment expectations, and the Ohio Supreme Court's rules controlled *pro hac vice* representation by out-of-state attorneys.

As earlier explicated, Section 24-11 of the Illinois School Code fixes the tenure expectations for teachers in Illinois' public schools. Only those teachers who have tenure are entitled to an expectancy of employment terminable only for cause. Patently, no board of education, no matter how unwittingly, has the authority or power to enlarge the limits of teacher tenure beyond statutory limits. Neither can this be accomplished by estoppel. 439 U.S. at 444, n.5. To render a decision, as both the District Court and Court of Appeals have done, which confers certain tenure privileges upon nontenured teachers is, in effect, to amend the Illinois tenure statute by judicial decree. Such a decision also ignores the teachings of *Roth, Sindermann, Bishop* and *Flynt*.

All of this is not to say that the respondent is barred from seeking redress for breach of his employment contract. As

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[7] There is no dispute that Respondent Vail knew the statutory scheme under which he was employed. Not only was he told on several occasions that he would be offered only a one-year written contract, he had also had some 20 years of experience in the public schools. (Pet. App. 44)

Judge Posner points out in his dissent: "An employee complaining of a breach of an employment contract under Illinois law has a right to damages for the breach, but not a right to specific performance of the contract, *Zannis v. Lakeshore Radiologists, Ltd.*, 73 Ill.App.3d 901, 392 N.E.2d 126 (1979), to reinstatement in other words . . . " *Vail* at 1452. This principle was applied to nontenured teachers in *Bessler v. Board of Education*, 69 Ill.2d 191, 370 N.E.2d 1050 (1977). Undoubtedly, the respondent would be awarded appropriate damages if he were to prevail in state court, assuming that his two-year commitment was legal under Illinois law--a determination more appropriately left to the Illinois courts.

III. THE BREACH OF A PROBATIONARY PUBLIC SCHOOL TEACHER'S EMPLOYMENT CONTRACT IS NOT LITIGABLE IN FEDERAL COURT UNDER 42 U.S.C. §1983.

Assuming arguendo that an implied two-year probationary employment contract is a property interest recognized by the Constitution, the remaining issue in this case is whether respondent Vail suffered a deprivation of that interest given the availability of an adequate state common law remedy for breach of contract. On the strength of *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), we feel that Vail did not.

While incarcerated in a Nebraska penitentiary, Bert Taylor, Jr., ordered hobby materials valued at $23.50. 451 U.S. at 529. Even though Taylor paid for the materials, he never received them because two employees of the prison failed to follow established state procedures designed to ensure delivery. 451 U.S. at 530. Taylor sued under Section 1983 claiming a loss of property without due process of law. 451 U.S. at 529. A Federal District Court granted him summary judgment, the Court of Appeals for the Eighth Circuit affirmed. 620 F.2d 307 (8th Cir., 1980) *(per curiam)*. This Court reversed the Court of Appeals by holding that the

respondent had not established that the admitted deprivation of property occurred without due process of law, noting that due process did not always require a predeprivation hearing. 451 U.S. at 537. The Court found that the availability of a Nebraska law remedy provided Taylor with a "meaningful opportunity" to test the propriety of the state's action sufficient to satisfy Constitutional demands of due process. According to the Court, "Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under §1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process." 451 U.S. at 544. Thus, the Court found that Taylor was not deprived of a Constitutional right without due process of law, and thus stated no claim under §1983. 451 U.S. at 544.

Again, the petitioners adopt the arguments advanced by Judge Posner in his dissent.[8] Applying *Parratt* to the facts at hand leads to the conclusion that respondent Vail has an adequate remedy under Illinois law sufficient to compensate him "for the property loss he suffered", 451 U.S. at 544, and, thus to satisfy Constitutional demands. Consequently, respondent Vail has no claim under Section 1983.

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[8]Since Judge Posner has given exhaustive treatment to this issue, petitioners see no need to be repitious, but rather direct the Court's attention to that part of the dissent found in *Vail* at 1453-1456.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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